Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1260

JAMES W. SMITH,

Petitioner,

v.

CHARLES MARTIN, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Warren Earl Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by James W. Smith for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case.

I. OPINIONS DELIVERED IN COURTS BELOW

The opinion of the Court of Appeals is reported at 542 F.2d 688 and is reproduced at Appendix P. 1a. Order granting summary judgment in favor of Respondent, Ro-

bert H. Helton, was entered by the District Court April 18, 1973 and is reproduced at Appendix P. 5a. Memorandum opinion of the District Court entered November 12, 1974 dismissing the complaint for lack of standing is reproduced at Appendix P. 6a and order predicated upon said memorandum opinion was entered November 12, 1974 and appears at Appendix P. 8a.

II. JURISDICTIONAL STATEMENT

The date of the judgment of the Court of Appeals sought to be reviewed and the date of its entry is October 12, 1976. Time for filing petition for writ of certiorari was extended by order of this Court to and including March 11, 1977. The order extending time appears at Appendix P. 9a.

III. QUESTIONS PRESENTED

1. Did petitioner's complaint (Appendix P. 10a) state a cause of action against Respondents under 28 USC Sec. 1331, 1343 and 42 USC Sec. 1981-1988.

2. Upon the facts alleged in the complaint was the Respondent, Helton, shielded by the principle of judicial immunity.

IV. STATUTES INVOLVED

28 USC § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

28 USC § 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the

protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

42 USC § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
R.S. § 1977.

42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

42 USC § 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall

be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

R.S. § 722.

V. STATEMENT OF THE CASE

This action was brought under 28 USC §§ 1331 and 1343 and under 42 USC §§ 1981, 1983 and 1988 for TWO MILLION DOLLARS ($2,000,000.00) damages against twenty-three Defendants, Respondents herein, who were charged with conspiring to deprive Petitioner and his clothing and apparel business of the equal protection of the laws of the State of Kentucky and of the laws of the United States of America. It charged that the conspiracy was accomplished, inter alia, by filing false complaints in the State Circuit Court with the result that orders were issued restraining Petitioner from entering his place of business, which was padlocked by Court order. These and other consequences resulted in Petitioner's loss of national franchises with apparel manufacturers and in the appointment of a receiver, who completely liquidated his business inventory. The action alleged that it was contemplated by Petitioner that he planned to expand his business in corporate form, that he had caused certain corporations to be organized, but that they had commenced no business and had no assets. The District Court granted summary judgment in favor of Respondent Helton on the grounds of judicial immunity and dismissed the complaint as to all other Respondents on the grounds that Petitioner lacked standing as a stockholder to sue for damages of the corporation. Petitioner had not sued as a stockholder, or for the use and benefit of any corporation, but sued on behalf of himself as an individual. The complaint in its entirety is reproduced at Appendix P. 10a.

VI. REASONS FOR ALLOWANCE OF THE WRIT

THE DECISION BELOW AFFIRMING THE DISTRICT COURT UPON THE GROUND THAT PETITIONER AS A STOCKHOLDER LACKED STANDING TO SUE FOR DAMAGES TO THE CORPORATION IS ERRONEOUS AS PETITIONER SUED FOR HIMSELF.

As shown by the Complaint in Paragraph 24, Appendix P. 15a, Petitioner as a member of a partnership sued for damages sustained by him and the partnership. The Complaint therein alleged.

> "That from October, 1967, up until December, 1967, plaintiff was continuously engaged in the clothing and apparel business in London, Kentucky, doing business under the trade name of James W. Smith, Clothing; that from December, 1967 to July 1st, 1968, plaintiff continued to run the business in London, Kentucky under the trade name of His & Hers Shoppe of London, Kentucky, and had taken in as junior partners, during said period, the defendants, Elsie Doyle and Glenn Doyle; that on or about the 17th day of May, 1969, plaintiff, together with Elsie Doyle, Glenn Doyle and William H. Bowling, established a co-partnership, wherein and whereby the said James W. Smith, Elsie Doyle, Glenn Doyle and William H. Bowling agree to continue to carry on the clothing and apparel business in the City of London, Kentucky, as a successor to the business formerly operated by the plaintiff and his junior partners, Elsie Doyle and Glenn Doyle, under the partnership trade name of "His & Hers Shoppe of London, Kentucky"; said agreement of Articles of said co-partnership was reduced to writing and was subscribed and sworn to by James W. Smith, plaintiff herein and the defendants, Elsie Doyle, Glenn Doyle and William H. Bowling on the 17th day of May, 1969 and consisted of six typewritten pages constituting the agreement. A copy

of the Articles of Co-Partnership is attached to this Complaint and made a part hereof the same as if set out in full herein, marked 'Plaintiff's Exhibit A'.

The cause of action, asserted in this pleading was exclusively that of petitioner, who, as a member of the partnership described in his Complaint and attached Exhibit had the right to maintain the action. Petitioner was the real party in interest.

THE DISTRICT COURT AND COURT OF APPEALS IMPROPERLY ACCORDED RESPONDENT, HELTON, JUDICIAL IMMUNITY.

It is the contention of petitioner that respondent, Helton, doffed his robe of judicial immunity by his participation in a conference held in the office of respondent, Cato, in which his departure from the role of an impartial judicial officer is disclosed by the deposition of plaintiff.

[50] Q. 109. What other complaints do you have in regard to the defendant, Corabell Driskell, other than you complain of her being appointed as a receiver in 412, Laurel Circuit Court?

A. Corabell Driskell was appointed without my knowledge, without my agreement, brought about the destruction of this; and when I did have a meeting, the first meeting I was privileged to be in at Mr. Cato's office at that time, which was my attorney, we discussed these matters with Mr. Bowling present, his attorney, Mr. Hilby was present, Elsie Doyle, Glenn Doyle, Judge Helton, myself and my wife, Shirley Smith. At this meeting I was told that I must take some action. I asked my attorney, Mr. Cato, to stand up and to please help me and represent me. I offered evidence there, that I was in

control, that I was acting in good faith; and the Judge informed me at that meeting that he would liquidate me if I did not come to some terms with them. I told Judge Helton that I could not agree with them because there was an indictment hanging [51] over my head that had been brought against me in his court, and that I could not take any action to settle this until this indictment was removed off of my head that was being used as a threat against me. I asked Mr. Cato in that meeting to represent me and to please help me and pleaded and begged him, and then I discovered there at that time . . . I already had a doubt in my mind that Mr. Cato was not acting in good faith as my attorney, that he had sold me out, that he was working with them. Mr. Cato also revealed in that meeting before the Judge that he had been in my store, he had met with the Doyles and Bowlings, he had even received merchandise out of my store after it was closed. And the Judge said "well, this indictment is brought against you". I said "Judge, I never took a dime from this lady in my life". And he said "Jim, it looks bad, I will liquidate you, I am going to have to do something about this indictment, you may have to go to the pen". Mr. Bowling agreed to this evidence here in a hearing the other day in this meeting.

110. Now, that was a meeting held in, as you allege, in your lawyer's office, Mr. Cato, here in London?

A. Yes, sir.

111. It was a hearing?

A. It was a meeting.

[52] 112. It was a hearing and an order was entered after that meeting?

A. I am not sure about that.

113. Mr. Cato was your attorney?

A. He was my attorney at that time.

114. Now, that meeting was held in a small room, was it, or was it not, in a lawyer's office?

A. About half as large as this room, maybe it was as long, not hardly as wide, large room.

115. I want you to go over in detail and tell me how far Mr. Milby was from Bob Helton when you say Bob Helton made these statements you are talking about in feet?

A. Mr. Milby was right there at the table.

116. Three or four feet?

A. Yes, sir.

117. How far was your attorney, Mr. Cato from you when you allege that Judge Helton made these statements?

A. Sitting at the same table.

118. Same room?

A. Yes, sir.

119. What about Mr. Bowling?

A. Same room.

120. Mr. Doyle, was he there?

A. Yes, sir.

[53] 121. Now, all the people there now were in close proximity of each other when you say Mr. Helton allegedly made these statements?

A. This meeting was lasted for a couple hours. Certain evidence that I offered that Mr. Milby acknowledged that he didn't know about up until that point. Judge Helton even covered certain questionable items that the Doyles and Bowlings had from Mr. Milby, and those people agreed that there were Twenty-Seven Thousand ($27,000.00) Dollars that they owed me that were unquestionable items after evidence and notes and continuing garanties that I offered, and Mr. Milby stated that this had not been explained to him before.

Petitioner's testimony stands uncontradicted by Judge Helton and his conduct and intimation to petitioner of a penitentiary sentence upon an indictment pending befor him soupled with his words *"Jim, it looks bad, I will liquidate you, I am going to have to do something about*

this indictment, you may have to go to the pen" places him as part of the conspiracy alleged in the Complaint and far removed fro mthe protective pale surrounding his office.

It is to be remembered that this meeting in Mr. Cato's office was in no way similar to a conference held by a Judge in chambers attended by counsel for the litigants in regard to litigation on trial.

Judge Helton's not so veiled threat to petitioner is the basis for the allegation in paragraph 31 subsection 6 of his Complaint shown at Appendix 32 where it is alleged:

> "Threatening, coercing and intimidating plaintiff by indicting him upon a baseless charge in the Laurel Circuit Court charging plaintiff with the offense of selling or disposing of mortgaged property; and in denying plaintiff a speedy trial of said indictment and continuing to hold same over his head for a continued intimidation to forego the bringing of this action, or any other action for relief from the malicious and unlawful conduct of the defendants as herein set out."

Why a Judge of the Kentucky Circuit Court would lend the dignity of his office with an obvious attempt to intimidate a party to actions pending before him is appalling to counsel for petitioner. But this is the record and petitioner submits that Judge Helton is responsible for his acts and words. His high office has been "leased out" and he should be held to answer.

VII. CONCLUSION

WHEREFORE, James W. Smith, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled case.

HOWELL W. VINCENT
Attorney for Petitioner
130 Park Place
Covington, Kentucky 41011

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of March, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys for Respondents: James F. Clay, Clay & Clay, Danville, Kentucky, for Charles Martin and Stanford Wood Products, Respondents; Harbison, Kessinger, Lisle & Bush, Lexington, Kentucky; Clay & Marye, Mt. Sterling, Kentucky, for Jos Hanson and Florsheim, Respondents; James S. Carroll, Lexington, Kentucky, James G. Sheehan, Jr., Danville, Kentucky, for Citizens National Bank and Ebb Bell, Respondents; William E. Hensley, Corbin, Kentucky, for Tom Alexander and Tom Alexander, Inc., Respondents; C. R. Luker, London, Kentucky, for First National Bank of London, Kentucky and Don Edwards, Respondents; Lester Burns, Burnside, Kentucky, for Robert Cato and O. D. Bruner, Respondents; J. Milton Luker, London, Kentucky, for Corabelle Driskill and Robert L. Milby, Respondents; Roy E. Tooms, Brown & Tooms, London, Kentucky, for Second National Bank of London, Kentucky and Warren Little, Respondents; Coleman Moberly, London, Kentucky, for Elden F. Keller and Harriett Keller, Respondents; B. Robert Stivers, London, Kentucky, for Elsie Doyle, Glenn Doyle and William H. Bowling, Respondents; Grant F. Knuckles, James S. Wilson, Pineville, Kentucky, for Robert H. Helton, Jr., Respondent and Burns & Mitchell, Somerset, Kentucky, for Respondents. I further certify that all parties required to be served have been served.

Howell W Vincent

HOWELL W. VINCENT
130 Park Place
Covington, Kentucky 41011

APPENDIX

No. 75-1665

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES W. SMITH, *Plaintiff-Appellant,* v. CHARLES MARTIN, et al., *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed October 12, 1976.

Before: EDWARDS, CELEBREZZE, and MCCREE, Circuit Judges.

PER CURIAM. We consider an appeal from summary judgment in favor of defendant-appellee Robert H. Helton, Jr. on the grounds of judicial immunity, and from an order dismissing the complaint against the remaining 22 defendants because of plaintiff-appellant's lack of standing to maintain the action. The action was brought under 28 U.S.C. §§ 1331 and 1343 and under 42 U.S.C. §§ 1981-1988 for two million dollars damages against 23 defendants who were charged with conspiring to deprive plaintiff and his clothing and apparel business of the equal protection of the laws of the State of Kentucky and of the laws of the

United States of America. It charged that the conspiracy was accomplished, *inter alia,* by filing false complaints in the state circuit court with the result that orders were issued restraining plaintiff from entering his place of business which was padlocked by court order. These and other calamitous consequences resulted in plaintiff's loss of national franchises with apparel manufacturers and in the appointment of a receiver for the complete liquidation of his business inventory.

On appeal, Smith contends that the court erred in treating his cause of action as one for injury to a corporation. He asserts that instead, he pleaded injury as a result of defendants' conspiratorial action to himself as an individual. He also contends that appellee Helton, a judge of the Circuit Court of Laurel County, Kentucky, lost his judicial immunity by participating in a conference held in the office of a defendant who had served as plaintiff's attorney. We affirm.

The district court was correct in holding that a stockholder cannot maintain an action under the Civil Rights Act for damages suffered by a corporation in which he owns shares. *Erlich* v. *Glasner,* 418 F.2d 226 (9th Cir. 1969). Although appellant is correct in his contention that the court did not consider his claim of a conspiracy to injure him as an individual, we nevertheless hold that the action was properly dismissed.

Although most of the 23 defendants were private citizens not acting under color of state law, they are, nevertheless, as private citizens subject to suit under 42 U.S.C. § 1985 (3) for conspiracy to deny a citizen the equal protection of the laws. *Griffin* v. *Breckenridge,* 403 U.S. 88 (1971). Such an action, however, must be founded on a class-based invidious discrimination. *O'Neill* v. *Grayson County War Memorial Hospital,* 472 F.2d 1140 (6th Cir. 1973); *Cameron* v. *Brock,* 473 F.2d 608 (6th Cir. 1973); *Azar* v. *Conley,* 456 F.2d 1382 (6th Cir. 1972). Appellant does not contend that there was ". . . some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge, supra* at 102. Accordingly, the action may not be maintained against the private defendants.

There are, however, defendants who as public employees might be held to have acted under color of state law for the purpose of suit under 42 U.S.C. § 1983. These defendants are the Sheriff of Boyle County, the Sheriff of Laurel County, the circuit court clerk and deputy circuit court clerk, the court-appointed receiver, and Judge Robert Helton in whose favor the district court entered summary judgment on the grounds of judicial immunity.

Appellant contends that Judge Helton "doffed his robe of judicial immunity by his participation in a conference held at the office of defendant Cato" and that he threatened, coerced, and intimidated plaintiff "by indicting him upon a baseless charge in the Laurel Circuit Court charging [him] with the offense of selling or disposing of mortgaged property; and in denying [him] a speedy trial of said indictment. . . ."

Extensive depositions were taken from which it clearly appears that Judge Helton's role throughout the litigation in state court was solely that of a duly qualified circuit judge acting within his judicial jurisdiction. Accordingly, contrary to appellant's contention, Judge Helton did not lose his judicial immunity by conducting a settlement conference in a place other than his courtroom at which all parties were present with their attorneys. *Pierson* v. *Ray,* 386 U.S. 547 (1967), *Azar* v. *Conley, supra.*

We hold that other state governmental officers whose duties are related to the judicial process also should be

insulated from personal liability when they, without malice or corrupt motive, carry out orders of a court. *Sullivan* v. *Kelleher,* 405 F.2d 487 (st Cir. 1968). Appellant has not alleged that the sheriffs, the court clerk and his deputy, or the receiver acted either outside their authority under court order or maliciously or corruptly, and has not pointed to any evidence developed during the lengthy discovery that would support such a charge. This doctrine, unlike the rule of judicial immunity, has limitations which we find unnecessary to explore here. *Cf. McCray* v. *Maryland,* 456 F.2d 1 (4th Cir. 1972).

This appeal presents issues similar to those in *Stathas* v. *Cox,* No. 76-1571 (6th Cir., decided Aug. 5, 1976) in which a special panel of this court appointed pursuant to Sixth Circuit Rule 3 (e) determined that the questions presented there were properly cognizable by the state courts, and held that the appeal was so unsubstantial as to permit summary affirmance under Sixth Circuit Rule 8. *See also, Graves* v. *Sneed,* No. 75-1746 (6th Cir., decided Sept. 1, 1976), where Chief Judge Phillips stated, "This case involves yet another effort to make a federal question out of litigation where exclusive jurisdiction is in State courts."

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

[TITLE OMITTED]

ORDER SUSTAINING MOTION OF ROBERT H. HELTON, JR. AND ENTERING SUMMARY JUDGMENT IN HIS BEHALF

(Filed April 18, 1973)

At the call of the docket on April 9, 1973, this case came on for hearing on the motion of defendant, Robert H. Helton for Summary Judgment. No one appeared on behalf of the plaintiff. The defendant, Robert H. Helton, was represented by counsel, Grant Knuckles.

The Court heard counsel and, being advised, ORDERED that the motion of defendant Robert H. Helton for Summary Judgment be and it is hereby sustained and Summary Judgment is entered herein on behalf of defendant, Robert H. Helton.

/s/ BERNARD T. MOYNAHAN, JR.
Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

[TITLE OMITTED]

MEMORANDUM OPINION

(Filed November 12, 1974)

This action was initiated by James W. Smith under the provisions of 42 U.S.C. § 1983. Mr. Smith, a majority stockholder in the ill-fated enterprises known as the His and Hers Shoppe of London, Inc. and the His and Hers Shoppe of Danville, Inc., alleges in a lengthy complaint that the named defendants engaged in a conspiracy to deprive him and his business of the right to equal protection of the laws; and the rights accorded them by the Privileges and Immunities clause and the Due Process clause respectively.

The case is presently before the Court upon motions to dismiss and motions for summary judgment filed by the numerous defendants.

It is apparent from the record that the plaintiff and his corporate business concerns were experiencing financial difficulty and that in an attempt to salvage what they could from the plaintiff's faltering businesses, various creditors initiated legal action which resulted in the foreclosure and sale of the two corporate entities and their remaining assets. The plaintiff asserts that such actions were in furtherance of a vast conspiracy to deprive him of his civil rights.

It is unnecessary for the Court to delve into the merits of the controversy, as it is the opinion of this forum that the plaintiff, as majority stockholder of the corporations allegedly damaged by the actions of the defendants, may not maintain this action under the Civil Rights Act for claimed damage suffered by the corporations.

It appears from the complaint that the plaintiff alleges damages to his corporate business and to himself individually; but save for a possible state action for malicious prosecution, it is difficult to conveive of a claim for damages inuring to one other than the corporate entities herein.

Therefore, the claimed damages are found to be those of the two corporations and not of James W. Smith individually. Accordingly the plaintiff may not maintain an action in his own name for damages allegedly suffered by said corporations, F.R.C.P. 17 (a), 13 Fletcher, *Cyclopedia of the Law of Private Corporations,* 366 § 5910 (1961 rev. vol.); *Erlich* v. *Glasner,* 274 F.Supp. 11 (C.D. Ca. 1967) aff'd. 418 F.2d 226 (9th Cir. 1969); *Gentry* v. *Howard,* 365 F.Supp. 567 (D.C. La. 1973).

An appropriate order dismissing the complaint for lack of standing shall this day be entered in conformity herewith.

This the 12th day of November, 1974.

BERNARD T. MOYNAHAN, JR.
Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

[TITLE OMITTED]

ORDER DISMISSING COMPLAINT

(Filed November 12, 1974)

In conformity with the Memorandum Opinion this day entered in this cause,

IT IS NOW THEREFORE ORDERED that the complaint be dismissed for the plaintiff's lack of standing to maintain this action; IT IS FURTHER ORDERED that the pending motions for dismissal and for summary judgment filed by the various defendants be and the same are hereby overruled as moot; AND IT IS FURTHER ORDERED that this case be stricken from the docket of this Court.

This the 12th day of November, 1974.

BERNARD T. MOYNAHAN, JR.
Judge

SUPREME COURT OF THE UNITED STATES

No. A-566

JAMES W. SMITH,
Petitioner,

v.

CHARLES MARTIN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 11, 1977.

/s/ POTTER STEWART
Associate Justice of the Supreme
Court of the United States

Dated this 13th day of January, 1977.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

[TITLE OMITTED]

COMPLAINT

(Filed January 7, 1972)

Plaintiff, James W. Smith, for this his Complaint, states:

1. That he is now and was at all times herein mentioned a citizen and resident of Laurel County, Kentucky and that his present address is and was during the times set out in this Complaint, P.O. Box 521, Route #6, London, Kentucky.

2. That defendant, Charlie Martin, was at all times mentioned in the Complaint, the duly elected, qualified and acting Sheriff of Boyle County, Kentucky, with his office in the City of Danville, Kentucky.

3. That defendant, The Citizens National Bank of Danville, Kentucky is a banking corporation, created and established under and by virtue of the Federal and State laws, authorizing it to engage in the general banking business, to contract and to be contracted with, to sue and to be sued, under and by virtue of its corporate name, to-wit: The Citizens National Bank; and that its principal office and place of business is in Danville, Kentucky.

4. That the defendant, Ebb Bell, was at all times mentioned in the Complaint, the President and Chief Officer of the Citizens National Bank of Danville, Kentucky and that his residence is in Danville, Kentucky and his mailing address is in care of The Citizens National Bank, Danville, Kentucky.

4-a. That the defendant, Tom Alexander, is now and was at all times mentioned in the Complaint engaged in the clothing and apparel business in the City f Danville, Kentucky and is occupying the former store and premises formerly owned and operated by plaintiff, doing business as "His and Hers Shoppes", Danville, Kentucky.

4-b. That the defendant, Tom Alexander, Inc., was at all times mentioned in the Complaint, a corporation created and established under the laws of the Commonwealth of Kentucky, authorizing it to sue and to be sued, to contract and to be contracted with, under and by virtue of its corporate name, to-wit: Tom Alexander, Inc.

5. That the defendant, Joe Hanson, is and was at all times mentioned in the Complaint a citizen and resident of Lexington, Kentucky; that he was agent and sales manager for The Florsheim Shoe Co., Inc., and acting within the course of his employment and the scope of his authority, and his residence and mailing address was 1716 Moreland Drive, Lexington, Kentucky.

6. That defendant, The Florsheim Shoe Company, Inc., was at all times mentioned in the Complaint, a nonresident corporation but authorized to do business in the State of Kentucky, and that same was created and established under and by virtue of law, authorizing it to sue and to be sued, to contract and be contracted with, under and by virtue of its corporate name, to-wit: The Florsheim Shoe Co., Inc.; that its principle place of business and office is 130 South Canal Street, Chicago, Illinois, 60606.

7. That the defendant, Stanford Wood Products Co., Inc., is a Kentucky corporation, created and established under the laws of the Commonwealth of Kentucky, authorizing it to sue and to be sued, to contract and be con-

tracted with, under and by virtue of its corporate name, to-wit: Stanford Wood Products Co., Inc., with its home office and mailing address being P.O. Box 226, Stanford, Kentucky, 40484.

8. That the defendant, Elsie Doyle, was at all times herein mentioned a member of plaintiff's co-partnership; that she is a citizen and a resident of London, Kentucky and her mailing address is Route # 5, London, Kentucky, 40741.

9. That defendant, Glenn Doyle, was at all times mentioned in the Complaint, a member of plaintiff's co-partnership and a citizen and resident of Lexington, Kentucky, with his residence and mailing address being 217 DelRay Drive, Lexington, Kentucky.

10. That defendant, William Homer Bowling, was at all times mentioned in the Complaint, a member of plaintiff's co-partnership; that he is a citizen and resident of London, Kentucky, with his residence and mailing address being Route # 5, London, Kentucky, 40741.

11. That defendant, Robert Cato, was at all times mentioned in the Complaint, an attorney at law, licensed to practice his profession in the Commonwealth of Kentucky; that he was a citizen and resident of London, Kentucky with his principal place of business and mailing address being Moberly Building, London, Kentucky, 40741.

12. That defendant, Robert L. Milby, was at all times mentioned in the Complaint, a duly licensed attorney and authorized to practice law in the Commonwealth of Kentucky and his residence and mailing address was 134 E. 5th Street, London, Kentucky, 40741.

13. That defendant, Corabelle Driskill, was at all times mentioned in the Complaint, a citizen and resident of London, Laurel County, Kentucky and that she became the duly appointed Receiver of His & Her Shoppes by Order of Court, and her mailing address was 108 Maple Street, London, Kentucky.

14. That defendant, Robert H. Helton, Jr., was at all times mentioned in the Complaint, an attorney at law, and duly authorized to practice his profession in the Commonwealth of Kentucky and was the Circuit Court Judge of Laurel County, Kentucky during the times set out in the Complaint.

15. That defendant, Robert L. Ackerson, Jr., was at all times mentioned in the Complaint, an attorney at law, and duly licensed to practice his profession in the Commonwealth of Kentucky; that he maintains an office at Bullock Building, Fifth Street, London, Kentucky.

16. That defendant, First National Bank of London, is and was at all times mentioned in the Complaint, a banking corporation created and established under Federal and State laws, authorizing it to engage in the general banking business, in the Commonwealth of Kentucky, and to contract and be contracted with, to sue and be sued, under and by virtue of its corporate name, to-wit: First National Bank of London, Kentucky, and that its principal office and place of business was Main Street, London, Kentucky.

17. That defendant, Don Edwards, was at all times mentioned in the Complaint, a citizen and resident of Laurel County, Kentucky and that his mailing address was London, Kentucky, in care of the First National Bank of London.

18. That defendant, Second National Bank of London, is and was at all times mentioned in the Complaint, a banking corporation created and established under and

by virtue of the Federal and State laws, authorizing it to engage in the general banking business in the Commonwealth of Kentucky, to contract and be contracted with, to sue and be sued, under and by virtue of its corporate name, to-wit: Second National Bank of London; and that its principal office and place of business is Main Street, London, Kentucky, 40741.

19. That defendant, Warren Little, was at all times mentioned in the Complaint, an Officer and Director of the Second National Bank of London, Kentucky; that he was a citizen and resident of Laurel County, Kentucky and his mailing address is Main Street, London, Kentucky, in care of the Second National Bank of London, Kentucky.

20. That defendant, O. D. Bruner, is and was at all times mentioned in the Complaint, the duly elected, qualified and acting Sheriff of Laurel County, Kentucky with his office in the City of London, Kentucky.

21. That defendant, Eldon F. Keller, was at all times mentioned in the Complaint, the duly elected, qualified and acting Circuit Court Clerk of Laurel County, Kentucky and his address was the Courthouse, London, Kentucky.

22. That defendant, Harriet Keller, was at all times mentioned in the Complaint, the duly qualified and acting Deputy Circuit Court Clerk in the office of defendant, Eldon F. Keller, Circuit Court Clerk of Laurel County, Kentucky; and that her address was the Courthouse, London, Kentucky.

23. That this action arises under the United States Constitution and the law established pursuant thereto and particularly Article I, Section 8, Article IV, Section 4, Amendments XIII and XIV, and the laws of the United

States, Title 18 U.S.C. §§ 231, 241, 242; Title 28 U.S.C. §§ 1331 and 1343; Title 42 U.S.C. §§ 1981-1988; Title 52 [50] U.S. §§ 203.

24. That from October, 1967, up until December, 1967, plaintiff was continuously engaged in the clothing and apparel business in London, Kentucky, doing business under the trade name of James W. Smith, Clothing; that from December, 1967 to July 1st, 1968. Plaintiff continued to run the business in London, Kentucky under the trade name of His & Hers Shoppe of London, Kentucky, and has taken in as junior partners, during said period, the defendants, Elsie Doyle and Glenn Doyle; that on or about the 17th day of May, 1969, plaintiff, together with Elsie Doyle, Glenn Doyle and William H. Bowling, established a co-partnership, wherein and whereby the said James W. Smith, Elsie Doyle, Glenn Doyle and William H. Bowling agreed to continue to carry on the clothing and apparel business in the City of London, Kentucky, as a successor to the business formerly operated by the plaintiff and his junior partners, Elsie Doyle and Glenn Doyle, under the partnership trade name of "His & Hers Shoppe of London, Kentucky"; said agreement of Articles of said co-partnership was reduced to writing and was subscribed and sworn to by James W. Smith, plaintiff herein and the defendants, Elsie Doyle, Glenn Doyle and William H. Bowling on the 17th day of May, 1969 and consisted of six typewritten pages constituting the agreement. A copl of the Articles of Co-Partnership is attached to this Complaint and made a part hereof the same as if set out in full herein, marked "Plaintiff's Exhibit A".

25. That among other things, the said Articles of Co-Partnership provided that the plaintiff would, from and after its formation on May 17, 1969, be owned in a propor-

tionate amount, percentage wise, with the percentages set opposite the co-partners names as follows:

James W. Smith	51%
Elsie Doyle and Glenn Doyle	29%
William Homer Bowling	20%

Said Articles of Co-Partnership further provided:

> "The said James Smith shall act as general manager of the partnership business and shall primarily make and take contracts for and on behalf of the partnership . . ."

and further provides as follows:

> "The moneys received by said partnership from said business shall be deposited in the Second National Bank in London, Kentucky, or such other bank or banks as said partners shall mutually agree upon, to the account and credit of the partnership. All debts and obligations of said partnership shall be paid by check on said bank account or accounts. Either James Smith or Glenn Doyle or William H. Bowling may sign checks for and on behalf of the partnership business."

26. That plaintiff continued to operate said business in a profitable fashion up until the 20th day of February, 1971; that from, on or about the 8th day of January, 1971 and continuously thereafter, up to on or about the 20th day of February, 1971, and still continuing in the State of Kentucky, the defendants and each of them did unlawfully and illegally conspire to deprive plaintiff and plaintiff's business of the equal protection of the laws as a citizen of the United States of America and of the State of Kentucky, to-wit: the laws in relation to due and established tribunals, their organization, procedure and course of justice, and particularly those relating to the rights guaranteed to plaintiff.

27. That said defendants and each of them conspired to deprive the plaintiff and plaintiff's business of the equal protection of the laws of the State of Kentucky and the laws of the United States of America and, in addition thereto, the said defendants, in carrying out the said conspiracy by themselves, their agents, servants and subordinates, each and all procuring, aiding and encouraging the defendants from and after the 8th day of January, 1971, up to and including the present, did purposely and systematically and intentionally with invidious discriminatory motivations, discriminate against plaintiff and plaintiff's business and subjected the plaintiff to inequality of treatment as a citizen and resident of Laurel County, Kentucky and of the United States of America by depriving plaintiff and plaintiff's business of the rights granted to him under the Constitution and laws of the United States of America and particularly those rights set forth in paragraph 23 of this Complaint, wherein and whereby said defendants, in carryingout said conspiracy, did impede, hinder, obstruct and defeat the due course and due process of law and justice in the United States of America and the State of Kentucky; and further, in carrying into effect said conspiracy, did deprive plaintiff and plaintiff's business of the rights, privileges and immunities secured to plaintiff and plaintiff's business by the Constitution and laws of the United States of America and the laws of the Commonwealth of Kentucky which extended to plaintiff and plaintiff's business those rights set forth in paragraph 23 of this Complaint.

28. That in carrying out said conspiracy and the maintaining and successful conclusion of same, the defendants, and each of them, did subject plaintiff and plaintiff's business to inequality of treatment, and denied plaintiff equal privileges and immunities of and under the law in

violation of the rights guaranteed to him by the Constitution of the United States of America and the laws in relation to said rights, according to due and established tribunals, their organization, procedure and course of justice, and particularly to those rights granted to plaintiff and plaintiff's business under the laws set forth in paragraph 23 of this Complaint.

29. That plaintiff and plaintiff's business was denied due process of law and justice in the United States of America and the State of Kentucky and plaintiff and plaintiff's business was deprived of equal rights, privileges and immunities secured to him by the Constitution and laws of the United States of America and the laws of the Commonwealth of Kentucky extended to plaintiff as a citizen of the United States of America and of the Commonwealth of Kentucky.

30. That said conspirators selected, used and made available to themselves during the tenure and carrying out of said conspiracy, the Laurel Circuit Court and the Orders of the said Court; the Laurel Circuit Court Clerk and his Deputies; false allegations in a worthless complaint and did, while acting under color of law and pretense of the statutes, ordinances, customs and laws of the State of Kentucky, and in a willful, malicious, intentional and invidious discriminating misuse of their authority, as a citizen and state officeholders of the Commonwealth of Kentucky, acting in concert with each other and with the other defendants, by themselves, their agents, servants or subordinates, each and all procuring, aiding and encouraging the other defendants from January 8, 1971, up to and including the present day, to-wit, January 8, 1972, did purposely and systematically and intentionally discriminate against the plaintiff and plaintiff's business thereby subjecting plaintiff to inequality of treatment and a denial of the equal protection of the law and a denial of equal privileges and immunities of the law. Said acts were committed by said conspirators under color of law and by invidious discriminatory conduct, said acts not being privileged or compelled by law as follows:

a. Causing the bank accounts of plaintiff and plaintiff's business at the First National Bank and Second National Bank of London, Kentucky and the Citizens National Bank & Trust Company, of Danville, Kentucky to be frozen and causing checks drawn by plaintiff on his accounts in said banks to be returned unpaid.

b. Forcing and compelling creditors of plaintiff and plaintiff's business, as a result of the nonpayment of his checks drawn upon plaintiff's account under the name of "His & Hers Shoppe", to resort to numerous and separate suits at law in the Laurel Circuit Court and other Courts to collect the debts owed by Plaintiff and plaintiff's business; said suits against plaintiff and plaintiff's business were numerous, and included among them, but not limited to were the following:

1. *Hargett Construction Company* v. *James W. Smith, et al,* Laurel Circuit Court, Civil Action No. 386;
2. *Norris Manufacturing Company* v. *James W. Smith, et al,* Laurel Circuit Court, Civil Action No. 488;
3. *Swank, Ind., Delaware Corporation* v. *His & Hers Shop, Inc., et al,* Laurel Circuit Court, Civil Action No. 518;
4. *The Territory Financial Corporation, et al* v. *His & Hers Shoppe, Inc., et al,* Laurel Circuit Court, Civil Action No. 519;
5. *Martin Cupp & Son, Inc.,* v. *His & Hers Shoppe,*

Inc., et al, Laurel Circuit Court, Civil Action No. 551;

6. *Stanford Wood Products* v. *James W. Smith, et al,* Lincoln Circuit Court, Civil Action No. 3357.

c. Causing plaintiff and plaintiff's business to lose franchises with the nationally advertised brand names such as Hart, Schaffner & Marx and Florsheim Shoe Company and others for nonpayment of accounts.

d. Causing an illegal sale of plaintiff's entire inventory and all of his matched fixtures, including wall to wall carpeting, appliances and furnishings located in the Danville Store known as "His and Hers Shoppe" to the defendant, Glenn Doyle, at a reduced price of $6,000.00; when the true value of said matching fixtures, appliances and equipment, had a market value of approximately $20,000; that defendant, Glenn Doyle, in pursuance of the conspiracy as herein set out, then in turn sold and conveyed title to same to defendant, Tom Alexander and/or defendant, Tom Alexander, Inc., so that the said defendant, Tom Alexander and/or defendant, Tom Alexander, Inc., aided and abetted in the carrying out of said conspiracy herein set out, and is continuing to conduct a business in the same premises and with the same fixtures and equipment that was formerly used by plaintiff in the Danville store operation known as "His and Hers Shoppe".

e. Willfully filing a false complaint in the Laurel Circuit Court in Civil Action No. 412, which filing was malicious and willful and resulted in the following steps being taken against plaintiff under color of law:

1. Wrongfully obtaining a Restraining Order prohibiting plaintiff from going or coming upon or about his place of business.

2. Obtaining a padlock order for the stores in Danville and London, Kentucky known as "His & Hers Shoppe" under the guise of a Restraining Order by the Clerk of the Laurel Circuit Court upon a $500 bond.

3. Causing the Sheriff of Laurel County, Kentucky, namely, O. D. Bruner, and the Sheriff of Doyle County, Kentucky, namely, Charlie Martin, to execute and perform the padlock order and Restraining Order issued upon the false complaint in Civil Action No. 412 thereby depriving plaintiff of his legal right to enter upon, carry on or maintain his said business.

4. Issuing an Order in the Laurel Circuit Court to auction off the inventory of plaintiff and plaintiff's business known as "His & Hers Shoppes" in London and Danville, Kentucky without any notice or hearing to plaintiff.

5. Illegally, wilfully and maliciously setting aside said Order to auction off the inventory of plaintiff and plaintiff's business in London and Danville, Kentucky and to thereupon without a hearing, appoint a Receiver, namely, defendant, Corabelle Driskill, to take over the assets of plaintiff and plaintiff's business known as "His & Hers Shoppes" in London and Danville, Kentucky and to cause same to be liquidated at a price far below the cost of the goods contained in said inventory.

6. Willful refusal to admit plaintiff to have a hearing in Court, to summon witnesses in his own behalf and a willful refusal to give him an opportunity to prepare a defense to the false charges set forth against him.

7. Threatening and coercing and intimidating and preventing plaintiff from making any objections to the unlawful liquidation of plaintiff's business.

8. Threatening, intimidating and coercing plaintiff from exercising and availing himself of due process and of the due course of the law.

9. Willful and malicious failure to act in good faith and pursuant to the mandate of state law in causing said plaintiff to be indicted on a charge commonly known as disposal of mortgaged property.

10. In intentionally suppressing the facts regarding the financial standing of plaintiff in his business and with suppliers and customers, thereby causing them to resort to separate legal actions against plaintiff.

11. In willfully causing monies and assets of plaintiff to be unlawfully withheld from plaintiff by freezing his savings account and his business accounts in the defendant banks; by collusion, intimidation and willful coercion of plaintiff's retained counsel, namely, defendant, Robert Cato, resulting in an Agreed Judgment and illegal Orders of procedure, all of which was in violation of plaintiff's rights and against his advice and judgment, thereby denying plaintiff equal privileges and immunities under the law and equal protection of the law.

12. By causing the defendant, Robert H. Helton, Jr., Laurel Circuit Court Judge, to enter and cause to be carried out illegal and invalid Orders.

13. In the willful coercion and intimidation of plaintiff to prevent him from exercising his rights under the Constitution of the United States of America and the laws of the Commonwealth of Kentucky; and

14. In causing a failure of distribution of the funds in the hands of the Receiver after a complete liquidation of plaintiff's assets and in the unlawful withholding and failure of distribution of the funds derived from the liquidation of plaintiff's business, causing persons or corporations who held claims of debt against plaintiff from being paid and increasing the court costs and interest on said claims; a copy of the Complaint, the Amended Complaint, Restraining Order, Order appointing a Receiver, Notice to auction off the assets of plaintiff's business, Order transferring bank accounts to Corabelle Driskill, Receiver for His & Hers Shoppes, and the Order approving Partial Sales are attached to this Complaint and made a part hereof the same as if set out in full herein, marked "Plaintiff's Exhibits B, C, D, E, F, G and H".

31. That in furtherance of the objects of the aforesaid conspiracy, the defendants, acting under color and pretense of the statutes, ordinances, customs and laws of the Commonwealth of Kentucky, and in willful, malicious, intentional and discriminatory misuse of their authority and that of other agencies of the Commonwealth of Kentucky, including the Circuit Court, Laurel County, Kentucky, and willfully acting in concert with the other defendants, each and all procuring, aiding and encouraging the other defendants, from January 8, 1971, up to and including the present time, did purposely and systematically and intentionally discriminate against plaintiff and subject him to inequality of treatment and denied plaintiff equal privileges and immunities in the following respects, which were neither privileged or compelled by law:

1. Resulting in liquidation of plaintiff's inventory of the two stores in London and Danville, Kentucky of the reasonable market value of $263,000, resulting in a cash recovery, in gross, the approximate sum of $96,000.

2. Intentionally causing the net worth of plaintiff's business in dollars and cents to be reduced from $130,000 to zero after the payment of debts and costs of liquidation by the defendant Receiver.

3. Causing the two places of business, which were at the time enjoying a successful and profitable operation, to be padlocked and closed resulting in a complete termination of all business activities by plaintiff.

4. Suppressing the facts regarding the ability of plaintiff and plaintiff's business to continue business in a normal fashion or to liquidate its obligations as they arose in an orderly fashion, or at all.

5. Causing plaintiff's attorney to willfully participate in said conspiracy without objecting or remonstrating whatsoever, in behalf of plaintiff's rights, despite the fact that it was defendant Cato's duty and in his power to remonstrate or object during the making and entry of the Orders hereinabove set out; by causing said defendant, Robert Cato, after various acts of collusion, to finally withdraw from all representation of plaintiff in Civil Action No. 412 and all other suits wherein said defendant Cato had undertaken to represent plaintiff in the Laurel Circuit Court; that said withdrawal was without legal excuse, and left plaintiff destitute and without legal counsel; and further by intimidating other members of the bar in Laurel and adjoining counties, through threat of reprisals, fear or other reasons unknown to plaintiff,

from representing plaintiff, or in any way advising him of his rights, or counselling him in the matters invalued herein, even though plaintiff vainly tried to hire other attorneys in Laurel, Clay and Knox County, Kentucky, and other cities of Kentucky; by wilfully refusing to allow plaintiff to appear and state his legal rights in said Civil Action No. 412, and in denying plaintiff's participation in any hearings or to examine any witnesses; or to summons witnesses in his behalf; or to testify or give evidence in his own behalf, in violation of plaintiff's Constitutional Rights to be present to offer evidence, to subpoena witnesses and to be heard and give evidence in his own behalf.

6. Threatening, coercing and intimidating plaintiff by indicting him upon a baseless charge in the Laurel Circuit Court charging plaintiff with the offense of selling or disposing of mortgaged property; and in denying plaintiff a speedy trial of said indictment and continuing to hold same over his head for a continued intimation to forego the bringing of this action, or any other action for relief from the malicious and unlawful conduct of the defendants as herein set out.

32. That the aforesaid acts upon the part of the defendants, and each of them, their agents, servants and subordinates, each and all procuring, aiding and encouraging the other defendants, from on or about January 8, 1971, up to and including the present time, in the Commonwealth of Kentucky, resulted in the plaintiff losing his entire business operation in the cities of London and Danville, Kentucky carried on under the trade name of "His & Hers Shoppe"; that said actions further resulted in the prevention of plaintiff from expanding into other markets, including the

establishment of stores in the City of Winchester, Kentucky and other cities; prohibiting plaintiff from carrying out his plans and prospects for an expansion of his business into the other major cities of the Commonwealth of Kentucky under a corporate name, to-wit: "His & Hers Shoppe of Kentucky, Inc.", thereby causing plaintiff to suffer great humiliation, embarrassment and mental anguish causing damage to his power to earn money, his credit and standing in the Commonwealth of Kentucky; that as a further result of the foregoing acts of the defendants, and each of them, acting in concert with the other defendants, by themselves, their agents, servants and subordinates, each and all procuring, aiding and encouraging the other defendants, from on or about January 8, 1971, up to and including the present time in the Commonwealth of Kentucky, plaintiff was harassed, intimidated, held up to ridicule, coerced and suffered serious physical permanent bodily harm, including grevious humiliation, indignity and nervous shock, depriving said plaintiff of his Constitutional Rights and his rights under the laws of the United States of America set forth herein, all to his damage in the sum of TWO MILLION DOLLARS ($2,000,000.00), which sum he ought to recover in this action.

33. That all of the aforesaid acts on the part of the defendants, and each of them, acting in concert with the other defendants, by themselves, their agents, servants and subordinates, each and all procuring, aiding and encouraging the other defendants, from on or about January 8, 1971, up to and including the present time, in the Commonwealth of Kentucky, were done and committed with malice and that by reason of said malicious conduct on the part of said defendants, and each of them, as herein set out, said plaintiff has been further damaged in the sum of TWO MILLION DOLLARS ($2,000,000.00) as punitive damages, which sum plaintiff ought to recover in this action.

WHEREFORE, plaintiff, James W. Smith, demands judgment against the defendants, and each of them, as follows:

1. TWO MILLION DOLLARS ($2,000,000.00) compensatory damages for the conspiratorial and unlawful acts of the defendants, and each of them, as set forth in the Complaint herein;

2. TWO MILLION DOLLARS ($2,000,000.00) punitive damages resulting from the conspiratorial, wilful and malicious acts of the defendants, and each of them, as set forth in the Complaint herein;

3. For his costs herein expended;

4. For all proper relief to which he may appear entitled; and

5. For a trial by a jury.

/s/ HOWELL W. VINCENT
Attorney for Plaintiff
130 Park Place
Covington, Kentucky 41011
Phone: 1-606-581-5177

Plaintiff, James W. Smith, states that he has read the foregoing Complaint, and the facts set out therein are true.

/s/ JAMES W. SMITH
Plaintiff

[JURAT OMITTED]

Supreme Court, U. S.
FILED
APR 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1260

JAMES W. SMITH, ... PETITIONER,

V.

CHARLES MARTIN, et al., ... RESPONDENTS.

BRIEF OF RESPONDENTS, ROBERT H. HELTON, JR., ROBERT L. ACKERSON, WILLIAM H. BOWLING, ELSIE DOYLE, GLENN DOYLE, ELDON F. KELLER, HARRIET KELLER, WARREN LITTLE, THE FIRST NATIONAL BANK IN LONDON, KENTUCKY, SECOND NATIONAL BANK OF LONDON, KENTUCKY, CORABELL DRISKILL, DON C. EDWARDS, THE FLORSHEIM SHOE COMPANY, INC., JOE HANSON, and ROBERT L. MILBY, IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Warren Earl Burger, Chief Justice of the Supreme Court of the United States

and the Associate Justices of the Supreme Court of the United States.

This is a brief for Robert H. Helton, Jr., Robert L. Ackerson, William H. Bowling, Elsie Doyle, Glenn Doyle, Eldon F. Keller, Warren Little, The First National Bank in London, Kentucky, Second National Bank of London, Kentucky, Corabell Driskill, Don C. Edwards, The Florsheim Shoe Company, Inc., Joe Hanson, and Robert L. Milby, in opposition to the petition of the Petitioner, James W. Smith, for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit.

I. OPINIONS BELOW

The opinion of the Court of Appeals is reported in 542 F.2d 688 and is reproduced in Appendix, pages 1a through 4a, filed with the petition. Orders of the United States District Court entering summary judgment in favor of the Respondent, Robert H. Helton, Jr., and dismissing the Petitioner's complaint as to all other Respondents are reproduced in that Appendix, pages 5a through 8a.

II. JURISDICTION

The jurisdictional requisites are set forth in the Petition.

III. QUESTIONS PRESENTED

The Petitioner's complaint was dismissed only after extensive depositions had been taken in discovery. Accordingly, the questions presented are:

1. Was the United States Court of Appeals correct in affirming the judgment of the United States District Court in dismissing Petitioner's complaint as against the Respondent, Robert H. Helton, Jr., on grounds of judicial immunity.

2. Was the United States Court of Appeals correct in affirming dismissal of Petitioner's complaint as against all other Respondents on the grounds and for the reasons set out in the judgment of the Court of Appeals.

IV. STATEMENT OF THE CASE

As recited in the opinion of the Court of Appeals, this action was brought under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. §§ 1981-1988 for $2,000,000.00 damages against the 23 Respondents who were charged with conspiring to deprive the Petitioner and his clothing and apparel business of the equal protection of the laws of the State of Kentucky and of the laws of the United States of America. The complaint is set out in Petitioner's Appendix, pages 10a-27a. It charged that the conspiracy, which commenced January 8, 1971, was accomplished, inter alia, by filing false complaints in

the State Circuit Court with the result that orders were issued restraining the Petitioner from entering his place of business which was padlocked by Court order, and that these and other consequences resulted in Petitioner's loss of national franchises with apparel manufacturers and in the appointment of a receiver for the complete liquidation of his business inventory.

The complaint alleged that the Petitioner and the Respondents, Elsie Doyle, Glenn Doyle, and William H. Bowling, operated two clothing and apparel stores, one at London and one at Danville, Kentucky, as partners under the name of "His & Hers Shoppe." However, the evidence shows that articles of incorporation of "His and Hers Shoppe of London, Inc.," and of "His and Hers Shoppe of Danville, Inc.," and certificates of incorporation by the Secretary of State of the Commonwealth of Kentucky were filed and issued on November 4, 1970. The articles of incorporation were signed and acknowledged by the Petitioner and Elsie Doyle, Glenn Doyle, and William H. Bowling as subscribing stockholders. We fail to find an allegation in the complaint that the corporations "had commenced no business and had no assets."

The 23 Respondents are of three categories, (1) Judge of the State Circuit Court, (2) State public officers acting under color of State law whose duties

are related to the judicial process, and (3) private citizens not acting under color of State law.

The Respondent, Robert H. Helton, Jr., is the Judge of the State Circuit Court, a court having "original jurisdiction of all matters, both in law and in equity" and admittedly having jurisdiction of the subject-matter and parties involved in the litigation referred to in Petitioner's complaint. The United States Court of Appeals affirmed summary judgment in favor of Judge Helton on the ground of judicial immunity, an immunity not abolished by the Civil Rights Act. *Pierson* v. *Ray*, (1967) 87 S.Ct. 1213, 1217-1218, 386 U.S. 547, 18 L. Ed. 2d 288.

In addition to the ground that a stockholder cannot maintain an action under the Civil Rights Act for damages suffered by a corporation in which he owns shares (Erlich v. Glasner, 418 F.2d 226, 9th Cir. 1969), the Court of Appeals cites other reasons for affirming dismissal of Petitioner's complaint as against all other Respondents. Thus, it held that the Respondents, Eldon F. Keller (Circuit Court Clerk), Harriet Keller (Deputy Circuit Court Clerk), and Corabell Driskill (Receiver appointed by the State court and acting under its orders), the Sheriffs, and other State governmental officers whose duties are related to the judicial process, are insulated from personal liability when they, without malice or corrupt motive, carry out orders of a court, as here (*Sullivan* v. *Kelleher*, 405 F.2d 487).

The Respondents, Robert L. Ackerson, William H. Bowling, Elsie Doyle, Glenn Doyle, Warren Little, The First National Bank in London, Kentucky, Second National Bank of London, Kentucky, Don C. Edwards, The Florsheim Shoe Company, Inc., Joe Hanson, and Robert L. Milby, are private citizens not acting under color of State law. Dismissal of Petitioner's complaint as to them and other Respondents in the same category was affirmed on the ground that they cannot be held liable for conspiracy to deny a citizen the equal protection of the law in the absence, as here, of a racial, class-based, invidiously discriminatory animus behind the conspirators' actions (*O'Neill* v. *Grayson County War Memorial Hospital*, 472 F.2d 1140, 6th Cir. 1973; *Cameron* v. *Brock*, 473 F.2d 608, 6th Cir. 1973; *Azar* v. *Conley*, 456 F.2d 1382, 6th Cir. 1972).

V. ARGUMENT

These Respondents respectfully maintain that the Petition herein does not present any special or important reason for granting a writ of certiorari. The Petitioner does not claim that the decision of the Court of Appeals herein is in conflict with another Court of Appeals on the same matter, or is in conflict with applicable decisions of this Honorable Court, or that it decides an important question of federal law which has not been, or should be, settled by this Court.

The Petitioner merely repeats here his arguments advanced before the Court of Appeals that the clothing and apparel business was a partnership, not a corporation, whereby he is a real party in interest, and that Judge Helton "doffed his robe of judicial immunity by his participation in a conference held in the office of respondent, Cato," the Petitioner's attorney at the time. Both arguments were very carefully considered by the Court of Appeals.

Considering the grounds recited by the Court of Appeals for affirmance of the dismissal of the Petitioner's complaint, such grounds would apply even were the business considered to be a partnership. Thus the Court of Appeals said, "Although appellant is correct in his contention that the court did not consider his claim of a conspiracy to injure him as an individual, we nevertheless hold that the action was properly dismissed."

Regarding Petitioner's claim that Judge Helton "doffed his robe of judicial immunity by his participation in a conference" in the office of the Petitioner's attorney, the Court of Appeals said:

> "Extensive depositions were taken from which it clearly appears that Judge Helton's role throughout the litigation in state court was solely that of a duly qualified circuit judge acting within his judicial jurisdiction. Accord-

ingly, contrary to appellant's contention, Judge Helton did not lose his judicial immunity by conducting a settlement conference in a place other than his courtroom at which all parties were present with their attorneys."

That this action does not present serious or important questions of federal law is borne out by the concluding paragraph of the opinion of the Court of Appeals where it is said:

> "This appeal presents issues similar to those in Stathas v. Cox, No. 76-1571 (6th Cir., decided Aug. 5, 1976) in which a special panel of this court appointed pursuant to Sixth Circuit Rule 3(e) determined that the questions presented there were properly cognizable by the state courts, and held that the appeal was so unsubstantial as to permit summary affirmance under Sixth Circuit Rule 8. See also, Graves v. Sneed, No. 75-1746 (6th Cir., decided Sept. 1, 1976), where Chief Judge Phillips stated, 'This case involves yet another effort to make a federal question out of litigation where exclusive jurisdiction is in State courts.' "

VI. CONCLUSION

For the reasons set forth above, these Respondents respectfully submit that the petition for certiorari should be denied.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of Respondents in opposition to Petition of James W. Smith for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit has been served upon the Petitioner, James W. Smith, by mailing true copies thereof to his attorney, Honorable Howell W. Vincent, 130 Park Place, Covington, Kentucky 41011, and upon other Respondents below by mailing true copies thereof to their attorneys below, to-wit: Honorable James F. Clay, 319 West Main Street, Danville, Kentucky 40422; Honorable William W. Hensley, First National Bank Building, Corbin, Kentucky 40701; Honorable Lester H. Burns, P.O. Box 675, Burnside, Kentucky 42519.

This 8th day of April, 1977.

s/ Grant F Knuckles

Of Counsel for Respondents named in foregoing Brief

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